

# EXHIBIT A

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION, HUNTERDON COUNTY  
DOCKET NO. HNT-L-584-02  
A.D. # A

MARY FERRANTE ,  
Plaintiff,  
VS.  
THOMAS J. SCIARETTA and the  
BOROUGH OF BERNARDSVILLE, a  
municipal corporation, et als,  
Defendants.

)  
)  
)  
) STENOGRAPHIC TRANSCRIPT  
) OF  
) MOTION IN LIMINE RE  
) TESTIMONY OF  
) DR. LOUISE F. FITZGERALD  
)  
)  
)

PLACE: Hunterdon County Justice Complex  
65 Park Avenue  
Flemington, New Jersey 08822

DATE: March 31, 2003

BEFORE:

THE HONORABLE EDMUND R. BERNHARD, J.S.C.  
AND A JURY

TRANSCRIPT ORDERED BY:

LISA MANSHEL, ESQ. (Francis & Manshel, LLC)

APPEARANCES:

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Attorney for the Plaintiff.

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Attorney for the Defendant Sciaretta.

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## Colloquy on Motion

(Outside the presence of the jury.)

THE COURT: All right. Everyone ready to proceed?

MS. MANSHEL: Yes, your Honor.

THE COURT: All right. Counsel had advised me and indicated they were making in limine motions with regard to the testimony of Dr. Fitzgerald. Mr. Beck had advised me that his in limine motion was pointed out in one paragraph in his March 3rd letter. Mr. Cipriano had sent me a brief on March 14th which Mr. Beck indicated he concurred. Miss Manshel had provided me with additional information in her March 6th response to the motions in limine.

Counsel had on several occasions referred to the necessity to hold a Rule 104 hearing. I indicated to them -- or rather I asked what the purpose of the Rule 104 hearing would be when I had their arguments.

I've had an opportunity to read the reports. Counsel concurred on Friday, as I recall, that it would not be necessary to have a Rule 104 hearing, and the testimony of Dr. Fitzgerald could be dealt with at oral argument.

Does that accurately reflect the procedural posture of where we're at?

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MS. MANSHEL: As far as I can recall, your Honor, yes.

MR. BECK: Yes.

MR. CIPRIANO: Yes, sir.

THE COURT: All right. Which of you wants to go first? Mr. Beck?

MR. CIPRIANO: Mr. Beck.

MR. BECK: Certainly, Judge.

The purpose of the Rule 104 hearing is that, although there may be concerning the second report perhaps no contest concerning an evaluation that Dr. Fitzgerald did of Ms. Ferrante --

THE COURT: The second report being the psychological report?

MR. BECK: Yes. Because that was done in person, and I am sure we are going to be able to testify -- question her about the protocol and that type of thing -- the first report, however, was done in the background where Dr. Fitzgerald had never met Mary Ferrante, had read over a number of documents concerning Mary Ferrante, and testifies generally about sexual harassment and the environment that creates sexual harassment response of a particular -- shouldn't say that -- the response, in general, of women to sexual harassment. And the purpose of my motion in

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## Colloquy on Motion

limine was that I believe that Dr. Fitzgerald, among other things, is not going to offer this jury on that particular -- on that discrete issue anything that would be of value to them.

Among other things, the literature in, even cited by Dr. Fitzgerald concerning responses of victims to alleged sexual harassment is a general set of statistical analysis where sexual harassment, in fact, is not defined. For example, in Dr. Fitzgerald's deposition, I had asked her about a set of studies conducted by I believe it was a Barbara Gutek, G-U-T-E-K. Now, that appears on -- in my deposition at about page 236. And one of the issues at that point was what was considered sexual harassment when this expert was going to be testifying about whether or not -- or whether victims report sexual harassment, for example, to coworkers, what their likelihood is to report it, to go through formal complaint procedures, things along those lines.

On page 236 I asked Dr. Fitzgerald, starting on line 2:

"According to some literature that I have, one of the studies that you at least based some reliance on is the Gutek, G-U-T-E-K, study.

"Yes -- well, she has done a --

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1 A. Yes -- well, yes. She has done a number of them.  
2 I don't know which one --

3 Q. 1985?

4 A. Okay.

5 Q. Who responds about certain things. One of  
6 the list items asked was whether the person -- " in  
7 this study -- "was being expected to socialize as part  
8 of the job. Do you believe that being asked to  
9 socialize, asking any woman to socialize as part of the  
10 job, constitutes --"

11 And then the Doctor interjects:

12 "I take no responsibility for Barbara  
13 Gutek."

14 And the question then continues:

15 "Q -- constitutes sexual harassment?"

16 A. No, I think it probably could, but it's never a  
17 question that I would ask on a sexual harassment  
18 inventory, I think that's just not --"

19 And then the question is:

20 Q. "But certainly some of the literature that  
21 has relied upon Gutek's findings necessarily then has  
22 to have incorporated that type of listing?"

23 And then the Doctor goes on.

24 A. "Well, actually you're oversimplifying it a bit.  
25 What I mean, I don't necessarily want to get into

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## Colloquy on Motion

1 Barbara's work, but she had a brief list of items that  
2 she developed very early on."

3 And then it continues.

4 But what the problem that I have at this  
5 point is that the Doctor incorporates studies and  
6 references studies in her report where she doesn't even  
7 agree with the definition of sexual harassment that's  
8 used.

9 In this particular case, one has to -- one  
10 has to question seriously the value of this expert  
11 being able to say to statistics where the definition of  
12 sexual harassment is -- changes from study to study.  
13 And I think it just is going to end up confusing the  
14 jury because we're going to have to go through so much  
15 to define, for example, whether the responses in the  
16 Gutek study are at all representative of anything that  
17 would be relevant to this case. I mean, that people  
18 are complaining about having to socialize on the job.  
19 That certainly is not one of the questions here, and I  
20 think at this time skews the statistics used by  
21 Dr. Fitzgerald.

22 That's the essence of the argument. I  
23 think the Court has had the opportunity to read over  
24 Dr. Fitzgerald's reports, and the issue that I have is  
25 just the relevance of this particular set of statistics



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1 to a particular -- to this particular case; that when  
 2 Dr. Fitzgerald, for example, testifies that -- and she  
 3 does testify at some point -- that personality, for  
 4 example, has something to do with -- let's see if I can  
 5 find that --

6 THE COURT: It would have been helpful if  
 7 you had called these deposition pages to my attention.  
 8 MR. BECK: Yes. Yes.

9 THE COURT: Because I spent a lot of time  
 10 in here Saturday morning. Go ahead.

11 MR. BECK: Okay. So, the issue that I  
 12 think, that I think is probably the most prevalent in  
 13 this case is whether a set of generic statistics are  
 14 going to have any relevance to this particular case  
 15 under the circumstances that the report was written;  
 16 that is, without the Doctor actually having met Mary  
 17 Ferrante at that time, done any kind of evaluation of  
 18 Mary Ferrante at that time, and without knowing  
 19 anything about Mary Ferrante or knowing anything about  
 20 the Borough of Bernardsville as well. The fact that if  
 21 she did not know the size of the employer, how many  
 22 people were employed, that type of thing.

23 THE COURT: Wouldn't that be an area of  
 24 cross-examination?

25 MR. BECK: I think that latter part would

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1 be an area of cross-examination, about the policy. But  
 2 as far as the testimony about whether Mary Ferrante's  
 3 conduct was consistent with a particular set of  
 4 statistics, that I think is not subject to  
 5 cross-examination. That is the actual subject upon  
 6 which this expert has been retained.

7 So, I don't think that it, under the  
 8 circumstances of this case as well as the documentation  
 9 or the data that's used in Dr. Fitzgerald's report, I  
 10 don't think it lends anything to this case. And,  
 11 therefore, I think it's going to just simply lead to  
 12 confusion of the jury, and for that reason it should  
 13 not be allowed.

14 THE COURT: Mr. Cipriano?

15 MR. CIPRIANO: Basically I say two things,  
 16 your Honor. Number one, I agree with Mr. Beck that the  
 17 term "sexual harassment" has not been adequately  
 18 defined by Dr. Fitzgerald, and I think this is  
 19 extremely important because we've been here now more  
 20 than three weeks and I think I can fairly say that  
 21 sexual harassment to Terry Tangorra is very different  
 22 from sexual harassment to a person who attends R-rated  
 23 movies and doesn't think that Playboy Magazine is lewd  
 24 and indecent. So, I think what is sexual harassment to  
 25 one person may be acceptable, if not indulged in

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1 behavior, by another. And, therefore, all of the  
2 opinions concerning sexual harassment --

3 THE COURT: Did you make that argument in  
4 your brief?

5 MR. CIPRIANO: No.

6 THE COURT: I read that. I read every one  
7 of the cases that you've cited to me. All right. Go  
8 ahead.

9 MR. CIPRIANO: The other point -- and I'll  
10 say this, Judge, just generally, your Honor -- I think  
11 the statements made by Dr. Fitzgerald seek to claim  
12 scientific certitude, and I do not believe that they  
13 are scientifically acceptable. And even if they could  
14 be scientifically acceptable, Dr. Fitzgerald's report  
15 does not demonstrate the basis on which she  
16 inferentially concludes that they are.

17 THE COURT: Miss Manshel?

18 MS. MANSHEL: Yes, your Honor. First of  
19 all, I just -- I want to be clear. I think what the  
20 scope of the motion is -- because Mr. Beck has talked  
21 about the size of the employer and things that I think  
22 are not cognizable in the motion --

23 THE COURT: I think if I understand it,  
24 what both Mr. Beck and Mr. Cipriano are talking about  
25 are essentially what you've called social framework

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1 opinions in dealing with the background of the social  
2 framework opinions. They've been a little bit more  
3 specific in using it, but I think generally and  
4 categorically that's what they're directing their  
5 attention to.

6 MS. MANSHEL: Yes. I became confused  
7 because Mr. Beck seemed to be indicating he had a  
8 problem on her testimony, whether the policies and  
9 procedures of Bernardsville are adequate. But I don't  
10 understand that to be the motion, so I am going to  
11 address --

12 THE COURT: I don't understand that to be  
13 part of the motion either.

14 MS. MANSHEL: Okay. As to scientific  
15 reliability, plaintiff is not seeking to qualify  
16 Barbara Gutek to testify as an expert in this case.  
17 Professor Fitzgerald has cited dozens and dozens and  
18 dozens of peer-reviewed pieces of research in the  
19 literature on sexual harassment that she testified are  
20 scientifically reliable and validated by internal  
21 testing measures. Barbara Gutek's report, study, can  
22 be the subject of cross-examination if defense counsel  
23 believes she relied in tiny, minute part on one study  
24 that had an assumption she questions. She also --

25 THE COURT: You mean, for example, the



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1 Gutek study.

2 MS. MANSHEL: Only the Gutek study. As I  
3 understand that, it's the only specific example defense  
4 counsel has.

5 The testimony at deposition was really a  
6 different issue than I think was represented by Mr.  
7 Beck. He was seeking to determine whether you're only  
8 sexually harassed if you are asked to go out with your  
9 boss, and I think Professor Fitzgerald explained that  
10 was an early study in the early days of what's been a  
11 field that has been evolving over the years. And I  
12 hardly think the fact that Barbara Gutek's study might  
13 not be the state of the art in 2003 doesn't mean Louise  
14 Fitzgerald isn't qualified to come here and testify.

15 As to her scientific methodology, Mr.  
16 Cipriano argues that she hasn't demonstrated it's a  
17 sufficiently reliable field. I would -- I think that  
18 would be a reason to have a Rule 104 Hearing. That  
19 argument was not made in the motion papers submitted by  
20 defense counsel, and I don't think I would have agreed  
21 that a 104 Hearing wasn't necessary if I understood  
22 they were going to attack her methodology in a way that  
23 she would need to rebut by testimony in a 104 Hearing.

24 But she did testify -- I won't give you the  
25 pages because, you know, you've already prepared -- but

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1 in numerous places in her deposition. For example, she  
2 teaches scientific methodology. She teaches sampling  
3 theory. She teaches it to graduate students. She  
4 explained in detail how survey methodology is created,  
5 why it's reliable. She explained in detail why  
6 psychological testing is reliable and the methodology  
7 used. You know, I can give you page numbers. I don't  
8 know that that's relevant.

9 She created something called the Sexual  
10 Experiences Questionnaire. Wasn't specifically used in  
11 this case, but defense counsel became aware of it  
12 somehow. They questioned her in detail about the  
13 structures of the SEQ and why that is reliable, random  
14 sampling, traditional statistical techniques, clinical  
15 analysis under reliable and valid authorities. She  
16 explained the social framework approach. She explained  
17 why it is not part of that methodology to do an  
18 evaluation of the plaintiff.

19 In this particular testimony, she is not  
20 offering opinion about Mary Ferrante's emotional  
21 distress or her personality. And if Mr. Beck wants to  
22 cross --

23 THE COURT: You mean in the social  
24 framework.

25 MS. MANSHEL: Exactly. There is an



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1 evaluation. That's a discrete segment of her  
 2 testimony. She is only explaining the scientific  
 3 evidence that she has testified is comprised of over  
 4 1,000 peer-reviewed, reliable scientific studies as  
 5 well as books and other kinds of articles and  
 6 literature, much of which she has contributed to with  
 7 her own original research. That forms a reliable body  
 8 of research about how victims of harassment respond.  
 9 The New Jersey Supreme Court recognized it in Lehman.  
 10 The New Jersey Supreme Court recognized it in the  
 11 matter of Seaman.

12 Mr. Beck argues it's not going to be  
 13 helpful to this jury; it's going to confuse them.  
 14 Well, this helpfulness, in her report she talks about  
 15 common misconceptions and myths about victims of sexual  
 16 harassment. The overarching misconception may be the  
 17 umbrella misconception is that if you are subject to  
 18 sexual harassment you're going to report it. That is  
 19 an important misconception that needs to be cleared up  
 20 to this jury.

21 The defendants' whole argument in this case  
 22 is that if this had really happened, Mary Ferrante  
 23 would have reported it. She concocted this because her  
 24 nephew didn't get a job, but she danced with Chief  
 25 Sciaretta. She sent cards to Chief Sciaretta. She

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## Colloquy on Motion

1 didn't confide in Valentine. She didn't confide in  
 2 Sorgie. She didn't tell Sandra Jones. She is  
 3 fabricating this because she didn't report when they  
 4 think she had opportunities. Clearly, the plaintiff is  
 5 entitled to meet these proofs and neutralize.

6 The battered women's line of cases, State  
 7 v. Kelly, State v. Frost, recognizes the identical kind  
 8 of social framework evidence to rebut the identical  
 9 kind of misconception about why, about women who are  
 10 subject to battering, the misconception if they were  
 11 really being battered they would report. It's directly  
 12 analogous, and I think it provides clear guidance that  
 13 this testimony is appropriate.

14 In addition, Mr. Cipriano's own brief  
 15 argues it's such common sense that a woman would be too  
 16 afraid to report that we don't need the testimony of  
 17 this overqualified expert to explain that. Well, the  
 18 fact that in his own brief he could argue direct common  
 19 sense is directly common sense as to what this  
 20 scientifically reliable and valid body of research  
 21 shows in itself demonstrates why it's so critical that  
 22 plaintiff be entitled to clear up this misconception  
 23 that even Mr. Cipriano has and urges on this Court as a  
 24 reason to exclude the testimony.

25 I think I have nothing further, your Honor.



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## Court's Decision

1 THE COURT: Mr. Beck, do you want to  
2 respond?

3 MR. BECK: No, Judge.

4 THE COURT: Mr. Cipriano, do you want to  
5 respond?

6 MR. CIPRIANO: No.

7 THE COURT: All right. This hearing deals  
8 with essentially the ability of Dr. Fitzgerald or  
9 permitting Dr. Fitzgerald to testify. And I think the  
10 parties take no issue with her psychological  
11 evaluation, testifying about the area called social  
12 framework and the matters relating to that.

13 First of all, Rule 702 states, "If  
14 scientific, technical, or other specialized knowledge  
15 will assist the trier of fact to understand the  
16 evidence or to determine a fact in issue, a witness  
17 qualified as an expert by knowledge, skill, experience,  
18 training, or education may testify thereto in the form  
19 of opinion or otherwise."

20 "The facts --" Rule 703 says, "The facts or  
21 data in the particular case upon which the expert bases  
22 an opinion or inference may be those perceived by or  
23 made known to the expert at or before the hearing. If  
24 of a type reasonably relied upon by experts in the  
25 particular field in forming opinions or inferences upon

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## Court's Decision

1 the subject, the facts or data need not be admissible  
2 in evidence."

3 The material attached to the report of  
4 Dr. Fitzgerald indicates the deposition testimony, the  
5 interrogatory testimony, and details and facts on which  
6 she based her opinions and her conclusions and the  
7 material that she had available.

8 Defendant in their brief argue that her  
9 opinion is a net opinion, lacking in scientific  
10 opinion, and cite Buckelew versus Grossbard, at 87 New  
11 Jersey. In looking at that case, net opinion is  
12 defined as, "The net opinion rule appears to be a mere  
13 restatement of the established rule that an expert's  
14 bare conclusions, unsupported by factual evidence, is  
15 inadmissible. It frequently focuses, as in Parker  
16 versus Goldstein, supra, on the failure of the expert  
17 to explain a causal connection between the act or  
18 incident complained of and the injury or damage  
19 allegedly resulting therefrom. Evidence Rule  
20 56(2)(a) -- " which I believe was 702 before the  
21 recodification -- "further provides that the testimony  
22 must be based primarily on facts, data, or other expert  
23 opinion established by evidence at the trial.

24 "Although Dr. Tuby's opinion might be  
25 vulnerable as a net opinion were it offered solely as



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1 direct evidence of defendant's negligence in this case,  
 2 we think it can and should be read as forming an  
 3 integral part of the foundation for the rule of res  
 4 ipsa loquitur." That was a certain medical malpractice  
 5 case.

6 "We have earlier averted to the rule that  
 7 an expert's opinion must be based on all the facts  
 8 relevant to the inquiry."

9 The rule has changed, so it no longer is  
 10 necessary that there be facts adduced during the course  
 11 of the trial.

12 Here there is not a net opinion.  
 13 Dr. Fitzgerald's opinions are based upon facts and  
 14 information gained from the depositions, from  
 15 pleadings, from interrogatories, and other information  
 16 that was provided both in detail.

17 New Jersey advocates the two schools of  
 18 thought with regard to expert testimony. The Frye  
 19 case, there are three ways under the Frye case the  
 20 proponent of scientific evidence can prove his general  
 21 acceptance and reliability: 1) by expert testimony as  
 22 to the general acceptance among those in the profession  
 23 in which the proffered expert witness based his or her  
 24 analysis; 2) by authoritative scientific and legal  
 25 writings indicating that the scientific community

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1 accepts the premises underlying the proffered  
 2 testimony; and (3) by judicial opinions that indicate  
 3 the expert's premises have generally been accepted.

4 As was said in State versus Kelly, "The  
 5 difficulty with expert's testimony is that it sounds as  
 6 if an expert is giving knowledge to a jury about  
 7 something the jury knows as well as anyone else,  
 8 namely, the reasonableness of a person's fear of  
 9 imminent serious danger." Kelly happened to deal with  
 10 the Battered Woman Syndrome. "That is not at all,  
 11 however, what the testimony is directly aimed at. It  
 12 is aimed at an area where the purported common  
 13 knowledge of the jury may be very much mistaken, an  
 14 area where jurors' logic, drawn from their own  
 15 experience, may lead to a wholly incorrect conclusion,  
 16 an area where expert knowledge would enable the jurors  
 17 to disregard their prior conclusions as being common  
 18 myths rather than common knowledge." Cited on page  
 19 206.

20 It is necessary to consider the expert's  
 21 testimony whether it satisfies the limitation placed on  
 22 expert testimony under Rule 702 and 703. These rules  
 23 provide that an expert may testify as to matters  
 24 requiring scientific, technical, or other specialized  
 25 knowledge if such testimony will assist the triers of



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1 the fact to understand the evidence or determine the  
2 facts in issue.

3 In effect, this Rule imposes three basic  
4 requirements for the admission of expert testimony:  
5 The intended testimony must concern a subject matter  
6 that is beyond the ken of the average juror. Much like  
7 here, much like the cases of Kelly and Frost and the  
8 Battered Woman Syndrome, I find that to be so. 2) The  
9 field testified to must be at a state of the art such  
10 as the expert testimony would be sufficiently reliable.  
11 I have reviewed through the number of treatises set  
12 forth in the CV of Dr. Fitzgerald's testimony. The  
13 sheer number and volume of treatises dealing with this  
14 indicating it appears to me that it is such a state of  
15 art. And the witness must have sufficient expertise to  
16 offer the intended testimony. Again, looking through  
17 her CV, granted it is a doctor, Dr. Fitzgerald's CV,  
18 but just the sheer volume of materials that she has  
19 published, her background in dealing in research in  
20 this area, I find that she has sufficient expertise.

21 The primary justification for permitting  
22 expert testimony is the average juror is relatively  
23 helpless in dealing with the subject matter is not a  
24 matter of common knowledge. I find that to be so. In  
25 discussing expert testimony in the Kelly case, it said

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1 at page 209: "As previously discussed, a battering  
2 relationship embodies psychological and societal  
3 features that are not well understood by lay observers.  
4 Indeed, these features are subject to a large group of  
5 misstereotypes. It is clear that this subject is  
6 beyond the ken of the average juror, thus is suitable  
7 for explanation through expert testimony." I find the  
8 same to be true here.

9 The second requirement that must be met  
10 before the expert testimony is permitted is showing  
11 that the proposed expert testimony would be reliable.  
12 To meet the requirement, the expert's testimony must be  
13 sufficiently reliable. Counsel must show that the  
14 testimony satisfied the New Jersey standard for  
15 acceptance of scientific evidence. That's why I  
16 recited to the Frye test just a moment ago, also State  
17 versus Cavallo, as a barometer for this particular  
18 issue.

19 The technique or motive analysis used by  
20 the expert must have a sufficiently scientific basis to  
21 produce uniform and reasonable reliable results so as  
22 to contribute materially to the as ascertainment of the  
23 truth. From the material provided to me and the  
24 background of Dr. Fitzgerald, I find that to be true.

25 There are three ways a proponent of



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1 scientific evidence can prove its general scientific  
2 acceptance and thereby its reliability: 1) By the  
3 expert testimony as to the general acceptance among  
4 those in the profession of the premises which offer the  
5 expert witness based his or her analysis. Again the  
6 litany of expert -- the litany of material that has  
7 been produced in this field, there are several pages  
8 which Dr. Fitzgerald has provided to me in her CV.

9 2) By authoritative scientific and legal  
10 writings indicating the scientific community accepts  
11 the premises underlying the proffered testimony.  
12 Again, I find this by the material provided to me.

13 3) By judicial opinions that indicate the  
14 expert's premises have gained general acceptance. I'll  
15 get to that in a minute.

16 In the Kelly case there was a question of  
17 whether judicial opinions concurred on the scientific  
18 acceptability. Quoting from the Court, "On the other  
19 hand, Dr. Veronen, the proffered expert, testified that  
20 the Battered Woman's Syndrome is acknowledged and  
21 accepted by practitioners and professors in the field  
22 of psychology and psychiatry. Dr. Veronen also brought  
23 to the Court's attention the findings of several  
24 researchers who have published reports confirming the  
25 presence of the Battered Woman's Syndrome." There is a

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1 volume of research which has been produced to this  
2 Court.

3 Continuing again in the Kelly case. "Thus,  
4 the record before us reveals that the Battered Woman's  
5 Syndrome has a sufficient scientific basis to produce  
6 uniform and reasonably reliable results." I find by  
7 sufficient literature provided to me and the nature of  
8 the research described by Dr. Fitzgerald in her CV that  
9 that likewise has been satisfied.

10 "Finally, before expert testimony may be  
11 presented, there must be a showing the proffered expert  
12 witness has sufficient expertise to offer the intended  
13 testimony." The Court quoted to Dr. Veronen again, the  
14 expert who testified in Kelly. "In this case, it  
15 appears that Dr. Veronen is qualified to testify as an  
16 expert. She has a Ph.D. in clinical psychology, as  
17 well as an M.A. from North Texas State. She is a  
18 member of four professional associations. As of 1980,  
19 when she was offered as witness in Ms. Kelly's trial,  
20 Dr. Veronen had been assistant professor in the medical  
21 school of the University of South Carolina for three  
22 years. Twenty percent of her time at the university  
23 was spent teaching, some of it on topics related to  
24 Battered Woman's Syndrome, and eighty percent of her  
25 time was spent conducting research, most of it on the



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1 psychological reaction of women who are victims of  
 2 violent assaults." In reading through Dr. Fitzgerald's  
 3 CV, I find that she is much more qualified than  
 4 Dr. Veronen was in this particular case.

5 State v. Frost, 242 New Jersey Super, 601,  
 6 the Court again talked about the issue of credibility  
 7 dealing with expert witnesses in this social framework  
 8 background. The Court said at page 610, "One issue on  
 9 this appeal is the admissibility of the Battered Woman  
 10 Syndrome evidence to bolster the victim's credibility  
 11 in prosecution of a defendant on an assault charge."  
 12 Frost was a criminal case.

13 "In his first point, defendant argues that  
 14 the use of Battered Woman's Syndrome evidence was  
 15 inappropriate here because it allowed the State to  
 16 bolster impermissibly the victim's credibility by  
 17 providing the jury with justification for her conduct  
 18 on the date of the incident." The Court went on.  
 19 "Nevertheless, there is nothing about the testimony  
 20 itself which makes it inappropriate for admission as  
 21 part of the State's case in chief where the woman  
 22 eventually asserts herself and reports her abuser to  
 23 authorities before she becomes the defendant on trial  
 24 for committing murder." In that case, it was the State  
 25 who dealt with the Battered Woman's Syndrome.

## Court's Decision

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1 The Court then referred to Rule 20, which  
 2 is now Rule 607 which we've dealt with several times  
 3 during the course of this trial. "Except as otherwise  
 4 provided by Rules 22 and 47, for the purpose of  
 5 appearing and supporting the credibility of a witness,  
 6 any party, including the party calling him, may examine  
 7 him and introduce extrinsic evidence relevant to the  
 8 issue of credibility."  
 9

10 "Thus, the credibility of a witness does  
 11 not have to have been the subject of attack before it  
 12 can be bolstered as was traditionally required in the  
 13 past." Expert testimony can now be used to support the  
 14 witness's credibility.

15 Our own Superior Court -- our own Supreme  
 16 Court has discussed the issues of the nonreporting  
 17 phenomena rather than dealing with it which is part of  
 18 the social framework opinion in the case of -- rather,  
 19 in the matter of Judge Edward Seaman, 133 New Jersey 67  
 20 at page 90, 1993 case. Quoting from that particular  
 21 page: "Complainant's failure to notify others of  
 22 respondent's harassing behavior; her continuing to  
 23 serve as respondent's clerk even though he was  
 24 allegedly subjecting her to degrading remarks and  
 25 unwanted physical contact; her apparently pleasant  
 demeanor toward respondent, including bringing



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1 respondent small gifts and offering social  
 2 invitations -- are all aspects of the larger phenomenon  
 3 of nonreporting. In understanding complaint's failure  
 4 to report respondent's misconduct, we note that the  
 5 E.E.O.C. has found that, 'the fact that an employee has  
 6 not promptly reported the sexual advances is not  
 7 dispositive of the issue of whether or not the advances  
 8 were unwelcome.' In sexual harassment litigation,  
 9 courts and agencies have admitted expert testimony that  
 10 reticence about complaining is common in cases of  
 11 sexual harassment." And cites in particular Robinson  
 12 versus Jacksonville Shipyards, Inc., 760 F. Supp. 1486,  
 13 a Florida case in 1991, admitting and crediting  
 14 consultant's testimony that women may not complain  
 15 about sexual harassment because of fear, embarrassment,  
 16 and feelings of futility.

17 In Robinson, the expert testified as to the  
 18 existence of a sexually hostile work environment at the  
 19 Jackson Shipyards, Inc. Dr. Fiske is the person who  
 20 testified in that case. Quoting from that opinion:

21 "Dr. Fiske's testimony provided a sound,  
 22 credible theoretical framework from which to conclude  
 23 that the presence of pictures of nude and partially  
 24 nude women, sexual comments, sexual joking, and other  
 25 behaviors previously described creates and contributes

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1 to a sexually hostile work environment. Moreover, this  
 2 framework provides an evidentiary basis for concluding  
 3 that a sexualized working environment is abusive to a  
 4 woman because of her sex."

5 "Ms. K. C. Wagner appeared as an expert  
 6 witness on plaintiff's behalf to testify on common  
 7 patterns and responses to sexual harassment an remedial  
 8 steps. Ms. Wagner's testimony concerning prevention of  
 9 harassment at Jacksonville Shipyards, Inc. is discussed  
 10 infra on the matter of appropriate remedies. Ms.  
 11 Wagner is a self-employed consultant in the area of  
 12 issues regarding women in work environment, with  
 13 particular emphasis on the prevention of sexual  
 14 harassment on the job."

15 "Her expertise and experience concerning  
 16 women in a nontraditional employment settings is  
 17 impressive. The Court accepted Ms. Wagner, over the  
 18 objection of defendants, as an expert on common  
 19 patterns and responses to sexual harassment and  
 20 accepted her, without opinion, as an expert in  
 21 education and training relative to sexual harassment."

22 "Ms. Wagner expressed her expert opinion  
 23 that sexually harassing conditions for female employees  
 24 exist at Jacksonville Shipyards, Inc. Her conclusion  
 25 rests on the presence of indicators of sexually



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1 harassing behaviors and of a sexually hostile work  
2 environment."

3 Counsel have also called the Court's  
4 attention to other cases where social framework  
5 testimony and other testimony about the adequacy of  
6 sexual harassment policy, particularly in the United  
7 States Supreme Court in Price Waterhouse versus  
8 Hopkins. It happened to be a different factual  
9 scenario in the hiring or elevating, rather, a partner  
10 in a major accounting firm. In that case, quoting from  
11 the Court, "Dr. Susan Fiske, a social psychologist and  
12 Associate Professor of Psychology at Carnegie-Mellon  
13 University, testified at trial that the partnership  
14 selection process at Price Waterhouse was likely  
15 influenced by sex stereotyping. Her testimony focused  
16 not only on the overtly sexed-based comments of  
17 partners but on gender-neutral remarks, made by  
18 partners who knew Hopkins only slightly, that were  
19 intensely critical of her."

20 "According to Dr. Fiske, Hopkins'  
21 uniqueness (as the only women in a pool of candidates)  
22 and the subjectivity of evaluations made it likely that  
23 sharply critical remarks such as these were the product  
24 of sex stereotyping -- although Dr. Fiske admitted that  
25 she could not say with certainty whether any particular

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1 comment was the result of stereotyping. Dr. Fiske  
2 based her opinion on a review of the submitted  
3 comments, explaining it was commonly accepted practice  
4 for social psychologists to reach this kind of  
5 conclusion without having met any of the people  
6 involved in the decision-making process."

7 "In finding that some of the partners'  
8 comments reflected sex stereotyping, the District  
9 Court" -- again reciting from the United States Supreme  
10 Court -- "relied in part on Dr. Fiske's expert  
11 testimony. Without directly impugning Dr. Fiske's  
12 credentials or qualifications. At trial, counsel for  
13 Price Waterhouse twice assured the Court that he did  
14 not question Dr. Fiske's expertise and failed to  
15 challenge the" -- testimony.

16 Also, the Court has -- rather, counsel has  
17 brought to the Court's attention the case of Shrout  
18 versus Black Clawson, which is Southern District of  
19 Ohio, 689 F. Supp 774. Again, the human resources  
20 expert was again qualified and testified on the social  
21 framework evidence. This claim was -- the Court said  
22 in that case -- that at page 777: This claim was  
23 authoritatively rebutted by Ms. Mary Belfry rebutting  
24 that it was common knowledge that the plaintiff would  
25 have complained or in other words done something about



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the conduct. Again quoting: "This claim was authoritatively rebutted by Ms. Mary Belfry, a human resources consultant qualified as an expert on corporate policy and procedure concerning sexual harassment. Ms. Belfry concluded that defendant had no policy regarding sexual harassment. She specifically expressed the opinion that the open-door policy did not qualify as a sexual harassment policy because it was too broad, it was not adequately communicated to the employees, it did not specifically mention sexual harassment, it did not."

Although the factual scenario shown in Black Clawson may be somewhat different than here, the point that I make is that the Court permitted an expert in the field to testify.

I find from the information that I have, from the arguments made, that I am going to permit Dr. Fitzgerald to testify on the area generally referred to as the social framework issue. Of course, she'll be subject to cross-examination on the issues such as those that counsel brought up today.

(Conclusion of motion and decision.)

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C E R T I F I C A T I O N

I, Janice M. Smith, C.S.R., License Number XI 00569, an Official Court Reporter in and for the State of New Jersey, do hereby certify the foregoing to be prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript to the best of my knowledge and ability.



JANICE M. SMITH, C.S.R., C.R.R.  
Somerset County Courthouse  
Date: December 31, 2003